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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

VICTOR F. ORLOWSKI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Under former Section 7609 of the Internal Revenue Code, does the automatic extension of the time for commencing a federal income tax fraud prosecution for 60 days after the entry of a District Court order to enforce IRS summonses, even where the taxpayer effectively consented to and took no appeal from the order, constitute an improper tolling of the governing statute of limitations?

2. Respondent prosecuted petitioner pursuant to Sectoin 7206(1) of the Internal Revenue Code for willful failure to report "substantial total income." Respondent's proof consisted largely of evidence that Petitioner had received payments from a partnership and had not reported the payments as income. In such a bottom-line prosecution, does the Government satisfy its burden of proof merely by proving unreported payments received from a partnership, or must it prove that the payments constituted income from the partnership?

LIST OF PARTIES

The parties to the proceedings below were petitioner Victor F. Orlowski and respondent United States of America. There are no additional parties to the proceeding before this Court.

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No.

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vs.

UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner Victor F. Orlowski respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on December 31, 1986, and February 4, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported as *United States v. Orlowski,* 808 F.2d 1283 (8th Cir. 1987), and is reprinted in the appendix to this petition. The order and judgment of the United States District Court for the Eastern District of Missouri have not been reported and are reprinted in the appendix to this petition.

JURISDICTION

Respondent invoked the jurisdiction of the United States District Court for the Eastern District of Missouri by filing an indictment charging petitioner with having twice violated 26 U.S.C. Section 7206(1). The jurisdictional basis of that indictment was 18 U.S.C. Section 3231. On November 6, 1985, the District Court entered judgments of conviction on each of two counts of the indictment pursuant to jury verdicts returned on October 3, 1985.

Petitioner filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit on November 14, 1985. The Court of appeals filed an opinion and judgment affirming the judgment of the District Court on December 31, 1986. Petitioner filed a petition for rehearing in the Court of Appeals on January 14, 1987. The Court of Appeals filed an order denying that petition on February 4, 1987.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

26 U.S.C. Section 6531. Periods of limitation on criminal prosecutions

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—

* * *

(5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

26 U.S.C. Section 7206(1). Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

* * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

(Former) 26 U.S.C. Section 7609. Special procedures for third-party summonses

(a) Notice.—

(1) In general.—If—

(A) any summons described in subsection (c) is served on any person who is a third-party recordkeeper, and

(B) the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons,

then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 14th day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain directions for staying compliance with the summons under subsection (b)(2).

* * *

(b) Right to intervene; right to stay compliance.—

(1) Intervention.—Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) Right to stay compliance.—Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to stay compliance with the summons if, not later than the 14th day after the day such notice is given in the manner provided in subsection (a) (2)—

(A) notice in writing is given to the person summoned not to comply with the summons, and

(B) a copy of such notice not to comply with the summons is mailed by registered or certified mail to such person and to such office as the Secretary may direct in the notice referred to in subsection (a) (1).

(c) Summons to which section applies.—

(1) In general.—Except as provided in paragraph (2), a summons is described in this subsection if it is issued under paragraph (2) of section 7602 or under section 6420(e) (2), 6421(f) (2), 6424(d) (2), or 6427(h) (2) and requires the production of records.

* * *

(e) Suspension of statute of limitations.—If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal pro-

secutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

STATEMENT OF THE CASE

A. Nature of the Case

Respondent prosecuted petitioner for the manner in which he reported his 1977 and 1978 income. The indictment was returned pursuant to 26 U.S.C. Section 7206(1) and charged that petitioner had failed to report "substantial total income" on his returns. Approximately 70 per cent of the money which respondent claimed that petitioner received and should have reported consisted of payments from a partnership.

B. Procedural History

Petitioner filed his 1977 tax return on October 15, 1978. On September 4, 1981, respondent filed several petitions to enforce internal revenue summonses in the United States District Court for the Eastern District of Missouri. The enforcement petitions were filed pursuant to 26 U.S.C. Sections 7402(b) and 7604(a) to facilitate an investigation of petitioner's 1977 and 1978 federal income tax returns. Petitioner did not object to the enforcement petitions and the District Court entered its orders granting all relief requested by the government on October 14, 1981, 40 days after the enforcement proceedings had been commenced.

An indictment was filed in the same District Court on January 18, 1985, six years and 95 days after petitioner had filed his federal income tax return for 1977. Count I of the indictment alleged that petitioner had violated 26 U.S.C. Section 7206(1) by filing a false income tax return for 1977 because the return omitted "substantial total income." Count II alleged that petitioner had violated the same statute in the same manner by the filing of his return for 1978.

Petitioner's pre-trial motion to dismiss Count I of the indictment as time-barred by 26 U.S.C. Section 6531, the governing six-year statute of limitations, was denied in an order entered September 3, 1985. After a jury verdict had been returned, the District court sentenced Petitioner to imprisonment for three months pursuant to Count I and to a probationary period of five years and to the payment of a fine of $3,000 pursuant to Count II. The judgment was filed on November 6, 1985.

Petitioner filed a timely notice of appeal to the United States Court of Appeals for the Eighth Circuit. The appeal raised the statute of limitations question and challenged the sufficiency of respondent's evidence to sustain the jury verdict and judgment of conviction. The Court of Appeals affirmed the judgment of the District Court on both counts in an opinion filed on December 31, 1986. The opinion rejected the statute of limitations argument:

> "We hold that a proceeding to enforce an IRS summons should be deemed 'pending' until there exists full compliance with the IRS summons or until the sixty-day appeal period following the entry of the judicial enforcement order has lapsed, whichever is shorter....
>
> "Applying this rule to the present case, the prosecution under count I of Orlowski's indictment is not time barred. The record reveals that full compliance with the five summonses was not achieved until after the lapse of the sixty-day appeal period. . . .Orlowski could have appealed the district court's enforcement orders at any time during the sixty-day appeal period. . . .Thus the statute of limitations on count I was tolled starting September 4, 1981, and continued to be tolled until. . .December 14, 1981."

808 F.2d at 1286. The opinion also rejected petitioner's contention that respondent had failed to meet its burden of proof. The Court of Appeals held that once respondent had proved that petitioner received payments from a partnership and did

not report them as income, the burden shifted to petitioner to prove that the payments did not constitute income. 808 F.2d at 1288-1289.

C. Statement of Facts

Petitioner is a 46-year-old business executive. He was never accused of a crime prior to this case. Petitioner earned a degree in atomic physics in 1963 and was employed for several years as an engineer. His work eventually led him into the food processing industry. He became an expert in the design and maintenance of machinery for that industry.

While working for Tammara Foods in St. Louis during 1972, petitioner sought a machinist who could manufacture specialized equipment for his employer. He was introduced to Ned Gentry, who operated a machine shop as a sole proprietorship in his basement. Gentry produced parts at petitioner's request while petitioner was employed by Tammara and later while petitioner was employed by Sea Pass, another food processing business. Gentry charged petitioner's employers for the parts he manufactured, and petitioner did not share in Gentry's compensation.

Petitioner's supervisor at Sea Pass was Bill Gramlich, the plant manager. During 1976, Gramlich left Sea Pass to become director of manufacturing for Iceland Seafood Corporation. He asked petitioner to help improve the manufacturing operation at Iceland. After observing Iceland's plant, petitioner recommended to Gramlich that Iceland modernize its frozen fish processing by installing a number of specialized saws.

Frozen fish entered the Iceland plant as a block approximately the size of a metropolitan telephone directory. Petitioner recommended an electrically-driven saw system designed to streamline the processing of those blocks into individual portions for preparation in fast food restaurants. The process would consist of a series of cross-cuts and slices and was designed by petitioner to produce portions measured with unusual

precision. The accuracy of the system promised to afford Iceland savings of millions of dollars each year. Iceland accepted the proposal and Gramlich instructed petitioner to prepare a proposal to manufacture the saws.

Petitioner and Gentry formed a partnership during 1976 to manufacture the series of saws. They expected to produce the saws over a three-year period. Petitioner and Gentry agreed to divide all profits from the saw manufacturing partnership. Gentry agreed to do all record- and bookkeeping. Petitioner had no experience keeping books and Gentry had both experience and record-keeping facilities. Both partners paid substantial expenses of the business between 1976 and 1978. Both incurred labor, material, and travel costs. Further, Gramlich demanded ten per cent of the purchase price of each saw as a kickback from petitioner and Gentry. Gentry made one payment to Gramlich and petitioner made all others. Gentry was immunized by respondent and eventually testified that he had "no idea" of how much petitioner spent for the partnership.

Petitioner never received money from the partnership unless he requested it. Petitioner asked Gentry for money from time to time. The payments which petitioner received from the partnership through Gentry aggregated $59,210 during 1977 and $23,427 during 1978. Petitioner testified that the payments he received from Gentry were exclusively for reimbursement of partnership expenses. Gentry acknowledged at trial that petitioner had paid substantial expenses of the partnership.

No evidence was presented at trial that the partnership had made a profit at any time. Gentry testified that the entire saw venture operated "pretty close" and that money was "always tight." He testified that he had not segregated his sole proprietorship machine shop operations from the partnership operations; that he had never made a calculation of the partnership's profitability; and that he lacked adequate information to determine the profitability of the partnership at any time. Gen-

try concluded that he could not be sure whether his partnership with Orlowski had earned a profit.

Stephen Gilbert, an Internal Revenue Service agent who served as respondent's expert witness, also testified regarding profit. He explained that the profitability of a partnership is determined "by taking all of the partnership expenses and subtracting them from the partnership income" and that "the net profit of a partnership as a whole . . . cannot be determined unless all the expenses are taken into account." Gilbert stated that neither the Internal Revenue Service nor Gentry knew whether the saw manufacturing partnership had been profitable. Gilbert stated that nobody could testify with certainty that the venture had earned any profit at all. He acknowledged that the reimbursement of expenses would not be income to a partner and that cash draws taken from an unprofitable partnership are not income and not taxable. Finally, after explaining how partnership profit is determined for tax purposes and acknowledging that nobody had determined whether the partnership between petitioner and Gentry had been profitable, Gilbert offered this explanation of the government's allegation that petitioner had earned income from that partnership: "His share of the profits from a partnership were allocated on the basis of the money that he actually received."

There also was no evidence presented at trial that petitioner received money from the partnership in an amount greater than his partnership basis. Nor was evidence adduced by respondent to establish what petitioner's basis in the partnership had been at any time. Petitioner testified regarding and to some extent documented expenditures which he had made in behalf of the partnership. Gilbert explained that any partnership funds distributed to a partner with zero basis in the partnership would be realized as income and treated as capital gain by that partner. But he agreed that a partner would have a positive basis in a partnership to the extent that he incurred any liabilities or expenses on behalf of the partnership, and that a partner could

draw money out of a partnership in an amount equal to his positive basis in the partnership without realizing income. Gilbert testified that respondent had made no calculation of petitioner's basis in the saw partnership.

No evidence was presented at trial that the partnership had guaranteed the payment of any money to petitioner or that petitioner had misappropriated any partnership funds.

After deliberating for approximately two days, the jury returned its verdict finding Petitioner guilty under both counts of the indictment. The District Court subsequently imposed sentence, and Petitioner commenced appellate proceedings.

REASONS FOR GRANTING THE WRIT

I.

The Eighth Circuit's construction of former Section 7609 of the Internal Revenue Code results in the gratuitous tolling of a criminal statute of limitations and conflicts in principle with numerous decisions of this Court.

The position of this Court regarding the import of criminal statutes of limitations is clear: "These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." *United States v. Marion,* 404 U.S. 307, 322 (1971). The Court has not equivocated in requiring that such statutes be construed liberally in favor of repose, *United States v. Habig,* 390 U.S. 222, 227 (1968), and has stated that provisions which create exceptions to ordinary periods of limitations for criminal cases must be narrowly construed. *United States v. Scharton,* 285 U.S. 518, 521-522 (1932). The opinion of the Eighth Circuit in this case construes former Section 7609 of the Internal Revenue Code in a manner which flies in the face of these principles.

The governing statute of limitations is 26 U.S.C. Section 6531, which requires that prosecutions of offenses defined in 26 U.S.C. Section 7206(1) be commenced within six years of their commission. Former Section 7609 created an exception to that statute by allowing the limitation period to be tolled during the pendency of a proceeding to enforce an Internal Revenue Service investigative summons, or during the pendency of any appeal from such a proceeding. Appeals from enforcement orders were required by the statute to be taken within sixty days after the entry of judgment.

The federal income tax return challenged in Count I of the indictment in this case was filed on October 15, 1978, and the six-year limitation period for a Section 7206(1) prosecution based

upon that return began to run on that date. *United States v. Habig,* 390 U.S. 222, 223 (1968). The running of the limitation period was tolled by the filing of enforcement petitions in the District Court on September 4, 1981. Then, as the Eighth Circuit acknowledged, "[o]n October 13, 1981, [petitioner] entered a consent to the enforcement of [one] IRS summons" and "interposed 'no objection' " the next day to the District Court's entry of enforcement orders relating to each of the remaining summonses. 808 F.2d at 1286. No appeal ever was taken from any of the enforcement orders.

The Eighth Circuit concluded that because the taxpayer involved in a summons enforcement proceeding under former Section 7609 had the "capacity" to appeal from a summons enforcement order for sixty days after the entry of judgment, "a proceeding to enforce an IRS summons is necessarily 'pending' during this sixty-day appeal period." 808 F.2d at 1287. That conclusion in fact is not "necessary" and is in direct conflict with the letter and spirit of this Court's opinions in *Marion, Habig,* and *Scharton.* It constitutes a liberal construction of the tolling provision of former Section 7609, results in a gratuitous extension of Section 6531, and ignores the considerations of justice which are the underpinning of this Court's pronouncements regarding criminal statutes of limitation.

This Court provided the rationale for its historic rulings regarding such statutes in *Toussie v. United States,* 397 U.S. 112 (1970):

> "The purpose of a statute of limitations is to limit exposure to prosecution for a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time...Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity."

397 U.S. at 114-115. The present case illustrated vividly the danger to criminal justice which statutes of limitations are intended to avoid. After respondent had taken more than six years to indict petitioner, its counsel cross examined him in detail about small and large transactions which had occurred seven and eight years earlier. Predictably, petitioner lacked a command of many details of those events. Respondent then capitalized on this natural consequence of the passage of time by highlighting petitioner's incomplete recollections and records during its closing argument. The absence of evidence at trial regarding the profitability of the partnership and petitioner's basis in the partnership also may be attributed in whole or substantial part to the staleness of this case by the time of indictment. The precise danger which this Court contemplated in *Marion, Toussie,* and other decisions was realized in this prosecution.

Section 7609 might have been drafted more clearly than it was. Congress could have defined the pendency of a summons enforcement proceeding to include or exclude the sixty days within which appeals would be allowed. It did not, and any resulting ambiguity in the statute cannot be resolved against Petitioner. In *Toussie,* this Court was "faced with the task of construing a somewhat ambiguous statute in one of two ways": the first would strictly limit the commencement of prosecutions to the period prescribed by the governing statute of limitations, and the second would relay that period. The Court chose the construction strictly limiting the time for commencing a prosecution, reasoning that "before we choose the harsher alternative, [we] require that Congress should have spoken in language that is clear and definite." 397 U.S. at 122. The Eighth Circuit chose the opposite approach in this case.

There simply is no valid basis for the position taken by the Court of Appeals. In *Burnett v. New York Central Railroad Co.,* 380 U.S. 424 (1965), this Court stated that the "basic inquiry" in determining whether and to what extent a statute of

limitations should be tolled is "whether the congressional purpose is effected by tolling . . . in given circumstances." 380 U.S. at 472. The self-evident purpose of Section 7609(e) was to compensate the government for each day in the limitation period which it lost because the taxpayer required it to obtain judicial enforcement of a summons. That Congress intended for the taxpayer to suffer such a natural consequence of his actions is apparent; that it intended for him to continue to suffer after the entry of judicial enforcement orders, and in the absence of any appeal, is not.

As this Court reiterated in *Burnett*, "statutes of limitations are primarily designed to assure fairness to defendants." 380 U.S. at 428. Gratuitous tolling of limitations periods is repugnant to that purpose. *United States v. Scharton, supra,* 285 U.S. at 521-522. The Eighth Circuit's suspension of the limitation period for sixty days beyond the effective conclusion of all summons enforcement proceedings was a gratuitous tolling. The erosion of protection afforded individuals by criminal statutes of limitation is plainly contrary to previous expressions of this Court. Review of this question will afford an opportunity to correct what otherwise will be a most unfortunate and confusing precedent.

II

The opinion of the Eighth Circuit results in significant diminution of the Government's burden of proof under 26 U.S.C. Section 7206(1) and raises important questions for future tax fraud prosecutions.

It generally goes without saying that the Government is required to prove each element of a tax fraud prosecution by proof beyond a reasonable doubt. *Holland v. United States,* 348 U.S. 121, 137-138 (1954). Respondent in this case elected to prosecute petitioner for willfully misstating bottom-line total income on two federal income tax returns. Most of the challenged "income" consisted of payments received by petitioner from a

partnership. The opinion of the Eighth Circuit relieved respondent of the burden of proving that those payments constituted income to petitioner, instead imposing upon petitioner the burden of proving that the payments were not income. This remarkable shifting of the burden of proof in a criminal case portends significant problems indeed.

1. Partnership income can only be proved in one or more of four ways.

The opinion of the Eighth Circuit correctly notes that partnership income can be established in only four ways. Such income can be established by proof that the partnership was profitable during the taxable year and that the taxpayer received or was entitled to receive a share of the profits. *United States v. Basye*, 410 U.S. 441, 454 (1973); 26 U.S.C. Sections 61(a)(13) and 702(c). There was no effort made in this case to prove that the partnership made any profit at all during 1977 or 1978.

Income from a partnership also can be established by proof that a partnership made payments to a partner in excess of his basis in the partnership. 26 U.S.C. Sections 705, 731, 733, and 741. Respondent was downright cavalier in acknowledging that it had not endeavored to determine petitioner's basis in the partnership or whether the payments which he received exceeded his partnership basis.

Payments from a partnership also can be proven to be income by establishing that they were "guaranteed payments" made "without regard to the income of the partnership." 26 U.S.C. Section 707(c). Respondent again made no effort to establish that the payments received by petitioner were made by the partnership without regard to its income: its evidence in fact was exclusively that those payments were intended by Gentry to be based upon reimbursement, income, or profit alone.

Finally, although funds obtained from a partnership by embezzlement or misappropriation may constitute income,

there was neither proof nor suggestion that petitioner had obtained his payments from the partnership by misadventure.

2. Respondent should have been required to prove that the partnership payments were income in order to make a *prima facie* showing that petitioner had committed the crime charged against him.

The indictment charged petitioner with failing to report "substantial total income," most of which consisted of payments received from the saw partnership. Section 7206(1), pursuant to which the indictment was returned, proscribes filing a return which one "does not believe to be true and correct as to every material matter." The only "material matter" alleged to be false in this case was the amount of total income reported. Respondent could not make a *prima facie* showing that petitioner had committed the crimes charged without at the very least (1) negating any partnership losses which would render other unreported income non-material[1] and (2) proving that the partnership payments to petitioner constituted income and that petitioner knew them as such. Respondent failed to meet this burden. Far from acknowledging respondent's evidentiary shortcoming, the opinion of the Eighth Circuit concluded that respondent need only prove "unreported payments from . . . the

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[1] Respondent indicted petitioner for failing to report his "substantial total income." Because of respondent's election to prosecute this case in that manner, rather than to prosecute for failure to report provable income, it was incumbent upon respondent to establish that petitioner was not entitled to claim a loss from the saw partnership. The absence of such evidence rendered absolutely impossible any determination of the accuracy or inaccuracy of total income reported by petitioner. By charging and prosecuting this case based on bottom-line total income, respondent assumed a burden of proof which its evidence did not support (and from which the Eighth Circuit ultimately granted it release.) This was no inadvertant error by respondent: it was obviously attractive to respondent to rely upon the partnership payments as its primary and most dramatic evidence against petitioner.

partnership" in order to shift the burden of proof to petitioner to establish that the payments did not constitute income. 808 F.2d at 1288-1289. Although that prosecutorial burden has been found to be correct in other contexts, it is singularly out of place in this partnership-based prosecution. The Eighth Circuit reached its position by analogizing this partnership case to non-partnership cases such as *United States v. Ballard,* 535 F.2d 400 (8th Cir. 1976), and *United States v. Bell,* 734 F.2d 1315 (8th Cir. 1984). The analogy is inappropriate because it ignores the extensive separate and distinct treatment for determining income from partnerhsips and from payments received from partnerships by the Internal Revenue Code. *See* Subchapter K, Internal Revenue Code of 1986.

The expressed effect of the opinion of the Eighth Circuit in this case is to allocate a significant burden of proof in tax fraud prosecutions involving unreported payments from partnerships to the taxpayer. No precedent exists for that ruling. The analogy upon which the Eighth Circuit relies in placing that evidentiary burden is inapt. The opinion represents a substantial departure from traditional burden of proof notions and a significant threat to criminal tax fraud defendants in the future. It should be reviewed by this Court as requested in this petition.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2375

United States of America,
Appellee,

v.

Victor F. Orlowski,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: June 9, 1986

Filed: December 31, 1986

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and BOWMAN, Circuit Judge.

BRIGHT, Senior Circuit Judge.

A two-count indictment charged appellant Victor Orlowski with willfully making and subscribing false income tax returns for calendar years 1977 (count I) and 1978 (count II), in violation of the Internal Revenue Code of 1954 § 7206(1), I.R.C. § 7206(1) (1982).[1] Counts I and II of the indictment alleged that

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[1] That section, as applicable, reads:

Any person who—

while Orlowski reported certain sums as his "Total income" on his 1977 and 1978 federal tax returns, he "well knew and believed, substantial 'Total income' should have been reported in addition to that heretofore stated."

A jury convicted Orlowski on both counts. The district court[2] sentenced Orlowski to three months participation in a work release program on count I and five years probation and a $3,000 fine on count II. Orlowski appeals, contending that (1) prosecution concerning his 1977 tax return was time-barred because the statute of limitations was not tolled during the sixty-day appeal period following entry of judicial orders enforcing IRS summonses; (2) the Government, by not establishing that the proceeds he received in 1977 and 1978 from the manufacture and sale of fish-cutting saws constituted "partnership income", failed to prove that he substantially understated his income during these two years; (3) the trial court erred in admitting into evidence the Government's summary charts which categorized payments received by him from the fish saw business as "unreported partnership income"; and (4) the trial court erred in instructing the jury on tax liability for partnership income.

---

(1) Declaration under penalties of perjury

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * *

* * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 * * *, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

[2] The Honorable George F. Gunn, Jr., United States District Judge for the Eastern District of Missouri.

We have carefully reviewed the record and conclude that count I is not time-barred, and that the conviction on both counts should be affirmed.

I. BACKGROUND

Despite the length of the trial, the evidence bearing on this appeal can be summarized with relative brevity. During the tax years in question, Victor Orlowski was employed on a semi-regular basis by several food processing companies, J & R Custom Foods and Tamara Foods, among others. At the same time, Orlowski did independent work within the same field of business, namely, consulting work for various other food processing companies, the selling the food processing equipment and the incorporation of Victor Foods, Orlowski's own food processing business.

The Government claimed that these assorted independent business ventures brought Orlowski $78,051 in 1977 and $36,727 in 1978, none of which was incorporated into his statement of total income on his 1977 and 1978 tax returns. According to the Government, the only income Orlowski reported came from his regular employment. For example, Orlowski's accountant testified that he arrived at the total income figure of $20,313 stated on Orlowski's 1977 return when he added what Orlowski claimed to have earned in wages at J & R Custom Foods that year to the gross receipts Orlowski received from O'Fallon Shoe Repair, a business owned by his wife. On his 1978 return, the principal item was noted "management services—Tamara Foods, Inc." for the amount of $8,310. Orlowski stated his total income that year to be the same, $8,310.

According to the Government's evidence, Orlowski obtained most of his unreported income during 1977 and 1978 from the manufacture and sale of fish-cutting saws. Beginning in late 1976, Orlowski contracted with Iceland Products, Inc. (Iceland, now Iceland Seafood Corporation) to build a series of fish-

cutting saws for use in Iceland's frozen fish processing plant in Camp Hill, Pennsylvania. Between January 1977 and November 1978, Orlowski delivered nine such saws to Iceland. The Expedite Machine Shop in St. Louis (Expedite), a shop owned and operated by Ned Gentry, constructed these nine saws. Iceland paid a total of $391,795 for the saws, of which the Government claims Orlowski received $59,210 in 1977, and $23,427 in 1978. Gentry testified that Iceland would pay Expedite for the saws and that he would then pay Orlowski whatever sums Orlowski requested out of the Expedite account. Gentry also testified that these checks were seldom made payable to Orlowski himself, but were instead made payable to others at Orlowski's request, in most instances to O'Fallon Shoe Repair where they were ultimately deposited in the O'Fallon Shoe Repair account at the Bank of Old Monroe in Old Monroe, Missouri.

Orlowski failed to produce any evidence at trial regarding the profitability of the fish saw business. Neither Gentry nor Orlowski maintained records of the business and neither filed a partnership tax return. Gentry testified that he and Orlowski had agreed that Expedite would incur all costs of construction, and that whatever money was left over would be split between the two of them. The parties did not formally calculate the split. Whenever Orlowski would ask him for money, Gentry testified that he would write a check payable to O'Fallon Shoe Repair because, in his words, "I figured he had it coming, we'd catch it up on the next saw if we didn't." (Tr. 1-184).[3]

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[3] The Government also produced evidence that Orlowski received money from a variety of sources other than the fish saws business during the tax years in question. This included consulting fees from Iceland in the amounts of $10,400 in 1977 and $9,800 in 1978; $3,300 from the Mar Craft Company in 1977 as a commission for the sale of a conveyor system built by Mar Craft to Iceland; some $5,141 from the sale of various pieces of food processing equipment to Sun Ring Foods; and finally, $3,500 in funds diverted from Crossroads Development, a public entity which served as the disbursing agent for Small Business Administration loans.

II. DISCUSSION

A. Statute of Limitations

We first address whether prosecution over the first count of the indictment is, as Orlowski contends, time-barred. All criminal tax prosecutions under the Internal Revenue Code of 1954 are governed by a six-year statute of limitations. I.R.C. § 6531 (1982). According to a strict application of the six-year statute to count I, the Government's indictment is untimely. While Orlowski filed his 1977 return on October 15, 1978, the Government did not file its indictment until January 18, 1985, ninety-two days after the statutory deadline.

Both parties agree that the statute was tolled fifty-five days during the issuance of certain IRS summonses. To make up for the remaining days, the Government contends that the statute was also tolled during the sixty-day appeal period following entry of a district court's order enforcing compliance with the summonses. If the statute is deemed tolled during this sixty-day appeal period, both parties agree that the Government's indictment is timely.

In 1980, pursuant to a civil audit of Orlowski's civil tax liability for 1977 and 1978, the IRS issued administrative summonses to five banks requesting that they produce the records of all accounts maintained by Orlowski and his wife during these two years. The IRS also issued a summons to Victor Orlowski in his capacity as the president of Victor Foods, Inc., to produce records of the Victor Foods business. Pursuant to a provision of the Internal Revenue Code, Orlowski was notified of the service of the summonses, I.R.C. § 7609(a)(1) (1982), and, as was his right, Orlowski directed the banks not to comply with the summonses. I.R.C. § 7609(b)(2).[4] On September 4, 1981, the

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[4] At the time Orlowski took this action, section 7609(b) read in part:

> **(2) Right to stay compliance.**—Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons

Government filed petitions to enforce each of the summonses in the Eastern District of Missouri. I.R.C. § 7609(d)(2). On October 13, 1981, Orlowski entered a consent to the enforcement of the IRS summons of the Victor Foods' records. On October 14, 1981, the district court directed that the summonses against each of the five banks be enforced by separate orders, and Victor and Sharon Orlowski interposed "no objection" on the record of each case. Neither the five banks nor Orlowski appealed the district court's orders regarding the bank summonses during the sixty-day period provided under Fed. R. App. P. 4(a)(1).

Whether the sixty-day appeal period tolls the statute of limitations for criminal tax prosecutions is contingent upon holding that a proceeding to enforce an IRS summons is "pending" during the appeal period. Section 7609(e), which suspends the statute of limitations in the event a taxpayer takes action, as Orlowski did here, to stay a third party's compliance with an IRS summons, reads in part, "the running of any period of limitations * * * under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending." I.R.C. § 7609(e).

We hold that a proceeding to enforce an IRS summons should be deemed "pending" until there exists full compliance with the IRS summons or until the sixty-day appeal period following the entry of the judicial enforcement order has lapsed, whichever is shorter. This rule follows directly from the statute. A taxpayer who intervenes in a third party summons under sec-

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under subsection (a) shall have the right to stay compliance with the summons if, not later than the 14th day after the day such notice is given in the manner provided in subsection (a)(2)—

(A) notice in writing is given to the person summoned not to comply with the summons, * * *.

I.R.C. § 7609(b)(2)(A).

tion 7609(b)(1) may appeal a judicial enforcement order.[5] Such an appeal is valid when filed at any time during the sixty-day appeal period so long as the parties subject to the summonses have not yet complied with the summonses. This circuit, as well as every other circuit that has considered the question, has determined that compliance with an IRS summons moots a taxpayer's appeal of summons enforcement orders.[6] Thus, because the taxpayer has the capacity to appeal an outstanding summons enforcement order at any time during the sixty-day appeal period, a proceeding to enforce an IRS summons is necessarily "pending" during this sixty-day appeal period.

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[5] This section reads:

> **(1) Intervention.**—Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons * * *.

I.R.C. § 7609(b)(1).

[6] *See, e.g.*, First Circuit: *United States v. Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.), *cert. denied*, 449 U.S. 1021 (1980); Second Circuit: *United States v. Deak-Perera Int'l Banking Corp.*, 610 F.2d 89 (2d Cir. 1979); Third Circuit: *Vesco v. SEC*, 462 F.2d 1350 (3d Cir. 1972) (analogous SEC subpoena case); Fourth Circuit: *Kurshan v. Riley*, 484 F.2d 952 (4th Cir. 1973); Fifth Circuit: *United States v. Sherlock*, 756 F.2d 1145 (5th Cir. 1985); Sixth Circuit: *United States v. Patmon*, 630 F.2d 458 (6th Cir. 1980); Seventh Circuit: *United States v. Porter*, 711 F.2d 1397 (7th Cir. 1983); Eighth Circuit: *United States v. Equity Farmers Elevator*, 652 F.2d 752 (8th Cir. 1981); Ninth Circuit: *EEOC v. St. Regis Paper Co.*, 717 F.2d 1302 (9th Cir. 1983) (analogous EEOC subpoena case); Tenth Circuit: *United States v. Trails End Motel, Inc.*, 657 F.2d 1169 (10th Cir. 1981).

Although the Third Circuit recently held that an appeal of a district court order enforcing IRS summonses was not moot despite compliance with the summonses, another issue was involved in the case, namely, whether the IRS could use the information it obtained under the summonses. *Gluck v. United States*, 771 F.2d 750 (3d Cir. 1985).

Applying this rule to the present case, the prosecution under count I of Orlowski's indictment is not time-barred. The record reveals that full compliance with the five summonses was not achieved until after the lapse of the sixty-day appeal period. Although three of the five banks subject to the summonses fully complied with the September 4, 1981 enforcement order within the sixty-day appeal period, two banks, the Bank of Old Monroe and the First Bank of St. Louis, did not completely comply with the summonses until April 11, 1983 and April 8, 1983, respectively. Orlowski could have appealed the district court's enforcement orders at any time during the sixty-day appeal period. Orlowski's failure to intervene in the summonses prior to entry of the district court's orders did not bar his right to appeal; federal courts permit postjudgment intervention for the purpose of appeal. *United Airlines, Inc. v. McDonald,* 432 U.S. 385 (1977); *Burkhalter v. Montgomery Ward & Co.,* 676 F.2d 291 (8th Cir. 1982); *In re Grand Jury Proceedings,* 655 F.2d 882 (8th Cir. 1981). Thus, the statute of limitations on count I was tolled starting September 4, 1981 and continued to be tolled until the lapse of the sixty-day appeal period on December 14, 1981, a total of 101 days. This is over a week longer than the ninety-two days needed to make the Government's January 18, 1981 indictment timely.

B. Orlowski's Statement of "Total Income" on his 1977 and 1978 Returns

Orlowski further contends on appeal that the district court erred in failing to direct a verdict in his favor as to both counts I and II. Orlowski claims that most of the income the Government alleges Orlowski failed to incorporate into his statement of "total income" on his 1977 and 1978 tax returns consisted of the payments he received from the fish saw business, a business he claims was actually a legal partnership between him and Ned Gentry. In the absence of proof that these proceeds constituted

"partnership income"[7], Orlowski claims that the Government failed to prove that Orlowski substantially understated his "total income" on his 1977 and 1978 tax returns. Orlowski himself produced no concrete evidence that either a partnership existed between him and Ned Gentry or that the alleged partnership lost money on the fish saw venture. Thus, Orlowski in essence claims that he is innocent of the charges because the Government cannot prove the nonexistence of alleged partnership expenses, the existence of which he himself has not proved and most likely cannot prove.

The argument is artful, but must be rejected. In *United States v. Ballard,* 535 F.2d 400 (8th Cir. 1976), we set forth the Government's burden of proof in making out its prima facie case of a section 7206(1) violation. In that case, we held that the Government's evidence of unexplained gross receipts established a prima facie case of the taxpayer's failure to disclose substantial amounts of gross income. "[E]vidence of unexplained receipts", this court and others have held, "shifts to the taxpayer the burden of coming forward with evidence as to the amount of offsetting expenses." *United States v. Bell,* 734 F.2d 1315, 1317 (8th Cir. 1984), *Siravo v. United States,* 377 F.2d 469, 473 (1st Cir. 1967). *See also United States v. Engle,* 458

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[7] As the appellant notes in his brief, "partnership income" can be established in one of four ways. These are proof that (1) the partnership was profitable during the taxable year and that the taxpayer received or was entitled to receive a share of the profits, I.R.S. § 702(c) (1982); *United States v. Basye,* 410 U.S. 441, 454 (1973); (2) a partnership made payments to a partner in excess of his basis in the partnership, I.R.C. § 731(a)(1)(1982); (3) payments made to a partner were "guaranteed payments" in that they were made "without regard to the income of the partnership", I.R.C. § 707(c)(1982); or (4) funds obtained by a partner from a partnership were obtained by embezzlement or misappropriation, *Hartman v. United States,* 245 F.2d 349, 353 (8th Cir. 1957); *Davis v. United States,* 245 F.2d 349, 353 (8th Cir. 1957); *Davis v. United States,* 226 F.2d 331, 334-35 (6th Cir. 1955), *cert. denied,* 350 U.S. 965 (1956).

F.2d 1017, 1020 (8th Cir.), *cert. denied,* 409 U.S. 875 (1972); *United States v. Lodwick,* 410 F.2d 1202, 1204 (8th Cir.), *cert. denied,* 396 U.S. 841 (1969).

The Government's burden under section 7206(1) announced in *Ballard* is the same when the taxpayer claims the existence of a partnership. Under the tax code, whatever taxes are owed on income accumulated by the partnership business must be paid by the partners in their individual capacities, just as a taxpayer must pay taxes on that portion of his salary or wages that represents income. I.R.C. § 701 (1982).[8] *See Schlude v. Commissioner of Internal Revenue,* 372 U.S. 128, 129 n.1 (1963). As in the case of an individual taxpayer, the receipts of a partnership are not taxable if they are outweighed by expenditures. I.R.C. § 702 (1982). Thus, the Government's proof in making out a prima facie case of an individual taxpayer as compared to a partner's willful substantial understatement of income should also be the same. We hold, therefore, that evidence that a partner received unreported payments from the alleged partnership entity in excess of his own expenditures in furtherance of the partnership's business establishes the Government's prima facie case of a section 7206(1) violation.

The Government in the present case met its burden of proof for a prima facie case of a two count section 7602(1) violation. As in *Ballard,* the Government introduced evidence that Orlowski received payments from the fish saw business that far

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[8] Section 701 reads:

> A partnership as such shall not be subject to the income tax imposed by this chapter. Persons carrying on business as partners shall be liable for income tax only in their separate or individual capacities.

I.R.C. § 701.

exceeded his expenditures.[9] Specifically, the Government introduced evidence that Orlowski received $59,210 in 1977 and $23,427 in 1978. This evidence established a prima facie case, whether or not payments from the fish saw venture are treated as a form of compensation to Orlowski or as a partnership distribution. At the point this evidence was introduced, the burden shifted to Orlowski to prove the existence of the alleged partnership and of alleged partnership expenditures that exceeded the alleged partnership's profits. Orlowski produced no such evidence. We therefore affirm the conviction on both counts I and II.

C. Summary Exhibits

Orlowski also claims the district court erred in admitting Government Exhibits 50A through 50J, consisting of summary charts reflecting Orlowski's total unreported income and tracing the disposition of the checks generating Orlowski's receipts for the years in suit. Orlowski seriously objects only to the sum-

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[9] The jury was entitled to assess the credibility of the evidence and thus to reject Orlowski's testimony that most of these payments constituted reimbursements for his expenses in the venture. *Moore v. Edison Co.*, No. 85-5309 (8th Cir. Nov. 3, 1986). Orlowski testified to some $38,000 in expenses on the saws, consisting of $28,000 in cash payments to Gramlich in 1977 and $14,000 in 1978 to secure the contracts with Iceland, and some $10,000 in additional expenses in 1977 and $4,000-$6,000 in 1978 toward labor and materials on the saws. While Gramlich denied receiving any cash payments, there was evidence of one such payment and Gentry admitted to making it. The record also shows that Orlowski's alleged sources for the cash payments—the O'Fallon Shoe Repair checking account in 1977 and his personal checking account in 1978—did not reflect cash withdrawals in amounts anywhere near sufficient to raise the cash amounts described by Orlowski. Gentry testified that although Orlowski may have paid some labor and material costs, he did not recall them to be of a significant amount. Even if Orlowski's account of his expenses on the venture in 1977 and 1978 is to be believed, he still received and failed to report over $21,000 in 1977 and over $11,000 in 1978 in gross income from the venture.

maries entitled "Computation of Total Income" which categorized Orlowski's partnership payments as "unreported partnership income". Summary exhibits are explicitly authorized by Fed. R. Evid. 1006. We have previously held that "[w]here charts which fairly summarize the evidence are used as an aid in understanding the testimony already introduced and the witness who prepared the charts is subject to cross-examination with all documents used to prepare the summary, the use of charts is proper." *United States v. Nelson,* 735 F.2d 1070, 1072 (8th Cir. 1984) (quoting *United States v. King,* 616 F.2d 1034, 1041 (8th Cir.), *cert. denied,* 446 U.S. 969 (1980)). The record reveals that these exhibits were summaries of the various kinds of income mentioned in testimony and documents already admitted into evidence. IRS agent Stephen Gilbert, who prepared these exhibits, was subject to cross-examination on the sources of all the information and the conclusions that the charts contained. Thus, we hold that the trial judge's use of the summary exhibits and his decision to send the exhibits to the jury was within the trial judge's sound discretion. *United States v. Lewis,* 759 F.2d 1316, 1329 n.6 (8th Cir. 1985), *cert. denied,* 106 S. Ct. 407 (1985).

D. Jury Instructions

Finally, Orlowski claims that the district court erred in instructing the jury regarding tax liability for partnership income because the Government failed to prove that the partnership payments received by Orlowski constituted income. For reasons already stated in part II.B., we reject this contention.

III. CONCLUSION

The judgment of the district court is affirmed as to all issues raised on appeal.

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2375EM

United States of America,
Appellee,

v.

Victor F. Orlowski,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellant's petition for rehearing has been considered by the Court and is denied.

February 4, 1987

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-4CR(6)

United States of America,
Plaintiff,

v.

Victor Orlowski,
Defendant.

ORDER

(Filed Sept. 3, 1985)

Upon consideration of the record, the report and recommendation of the Honorable Robert D. Kingsland, United States Magistrate, and defendant's objections thereto,

IT IS HEREBY ORDERED that defendant's motion to dismiss Count I be and is denied.

Defendant seeks to dismiss Count I of the indictment, maintaining that it was not filed within the applicable six (6) year statute of limitations prescribed by 26 U.S.C. §6531. The indictment in this case was filed on January 17, 1985. With respect to the allegations in Count I of the indictment, Judge Cahill issued an order enforcing third party summonses on October 14, 1981. Defendant had sixty (60) days, or until December 13, 1981, within which to file an appeal from the enforcement order. Defendant neither filed a written waiver of appeal nor fully complied with the summonses during the appeal period. In the opinion of this Court, Magistrate Kingsland correctly held that the statute of limitations was tolled during the appeal period.

IT IS FURTHER ORDERED that defendant's motion to dismiss the indictment on the basis of abuse of the grand jury be and is denied.

IT IS FURTHER ORDERED that defendant's motion to dismiss the indictment due to vagueness, and in the alternative for a bill of particulars, be and is denied.

IT IS FURTHER ORDERED that defendant's motion to dismiss for pre-indictment delay be and is denied.

IT IS FURTHER ORDERED that defendant's motion to suppress be and is denied.

IT IS FURTHER ORDERED that defendant's motion for discovery be and is denied.

Dated this 3rd day of September, 1985.

/s/ George F. Gunn, Jr.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JUDGMENT AND PROBATION/COMMITMENT ORDER

Defendant: VICTOR F. ORLOWSKI

Docket No: 85-00004CR (6)

Counsel: In the presence of the attorney for the government the defendant appeared in person on this date: *November 6, 1985.*

With Counsel: Merle Silverstein, Retained

Plea: NOT GUILTY

Finding & Judgment: There being a verdict of GUILTY to Cts. I & II of Indictment.

Defendant has been convicted as charged of the offense(s) of willfully, knowingly making and subscribing a U.S. Individual Income Tax Return, Form 1040, for calendar years 1977 and 1978, in that said returns reported "Total Income" of $20,313.00 and $8,373.00, respectively, whereas, he knew substantial "Total Income" should have been reported in addition to that heretofore stated. In violation of Title 26, United States Code, Section 7206(1), as charged in Cts. I and II of indictment.

Sentence or Probation Order:

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no suf-

ficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) MONTHS and making payment for the costs of prosecution, as to and under the charge contained in Count I of the indictment. Service of sentence on Count I to be at St. Louis County, Mo. Department of Justice Services with participation in the Work Release Program; Fine of $3,000.00 and costs of prosecution and placed on probation for a period of FIVE (5) YEARS, which is to commence upon completion of sentence imposed under Count I, as to and under the charge contained in Count II of the indictment, upon the following special conditions of probation:

You shall pay the fine of $3,000.00 during the first FOUR (4) YEARS of probation;

You shall be regularly and gainfully employed and failure to be gainfully employed shall be a basis for revocation of probation;

You shall not receive, possess, or transport any firearm, ammunition or any type of explosive device.

Defendant released on bond pending appeal. Defendant can voluntarily surrender at designated institution.

Signed By: /s/ George F. Gunn, Jr.
U. S. District Judge

Date: 11/6/85